Dr Nuur Iman Rahmatullah Khan v Ampang Puteri Hospital Sdn Bhd & Anor

HIGH COURT (SHAH ALAM) — SUIT NO BA-22NCVC-517–11 OF 2019
ALICE LOKE J
31 JULY 2023

Tort — Negligence — Medical negligence — Plaintiff suffered neck and back pain — Plaintiff received treatment at private hospital — Plaintiff sued private hospital and doctor working at private hospital for injuries sustained following percutaneous disc coagulation therapy ('PDCT') procedure conducted by doctor — Whether PDCT was acceptable management for neck and back pain — Whether doctor had conducted adequate investigation on plaintiff prior to PDCT — Whether plaintiff was duly advised on risks, benefits and complications of PDCT procedure by doctor — Whether PDCT procedure was properly conducted by doctor — Whether hospital was negligent in failing to provide safe system for healthcare provision — Whether injuries suffered by plaintiff was caused by PDCT procedure — Whether hospital vicariously liable for acts or omissions of doctor — Whether hospital owed non-delegable duty of care to plaintiff — Whether doctor was independent contractor — Whether plaintiff entitled to special damages, general damages, aggravated damages and costs — Whether Sanderson order ought to be made by court

The plaintiff in the present case had filed an action against Ampang Puteri Hospital Sdn Bhd ('D1') and one of its doctors ('D2') for injuries she sustained following a procedure known as percutaneous disc coagulation therapy ('PDCT') to manage her neck and back pain. The PDCT procedure was conducted by D2 at D1's hospital but the said procedure could not be completed because the needle used for the said procedure bent in D2's third attempt to deliver the laser at the C5/C6 disc level. It ought to be noted that prior to seeking treatment at D1's hospital, the plaintiff was treated at Pantai Hospital whereby MRI was performed, and the result showed features of cervical spondylosis. The issues arose in the present case were: (a) whether PDCT was acceptable management for the neck and back pain experienced by the plaintiff; (b) whether D2 had conducted adequate investigation on the plaintiff prior to the PDCT — in relation to this issue, plaintiff argued that D2 ought not to have placed reliance on the MRI done some 11 months prior; (c) whether the plaintiff was duly advised on the risks, benefits and complications of the PDCT procedure by D2; (d) whether the PDCT procedure was properly conducted by D2; (e) whether D1 was negligent in failing to provide a safe system for healthcare provision; (f) whether the PDCT caused or materially contributed to the fusion of the spine at level C5/C6 and

increased the risk of the plaintiff's spine degeneration ('the issue of causation'); and (g) whether D1 was liable for the acts/omissions of D2 — with respect to this issue, the plaintiff submitted that D1 owed a non-delegable duty of care to the plaintiff and that D1 was vicariously liable for the acts/omission of D2. With respect to damages, the plaintiff claimed for: (i) special damages for hospital and medical expenses in the sum of RM50,000, loss of income amounted to RM22,000 and costs of medications, nutritional supplements etc; (ii) general damages for pain and suffering in the sum of RM150,000; and (iii) aggravated damages in the sum of RM200,000. As for the costs, the plaintiff prayed for a Sanderson order to be made.

Held, dismissing the plaintiff's claim against D1 with costs of RM30,000 to be paid by the plaintiff to D1 and allowing the plaintiff's claim against D2 with costs of RM70,000 (with additional costs of RM15,000 for the interlocutory application):

(1) D2's decision to treat the plaintiff's complaints by PDCT pertained to the question of diagnosis and treatment. The test propounded in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 had long been held to be the locus classicus by the Malaysian courts on the standard of care in matters of diagnosis and treatment. The *Bolam*'s test essentially stated that a doctor was not guilty of negligence if he had acted in accordance with a practice accepted as proper by a responsible body of medical opinion, even if there was a body of opinion that held a contrary view (see para 32).

(2) At the time the plaintiff presented herself at the Ampang Puteri Hospital, she had been in pain for about two years prior. Both the defence experts opined that if conservative treatment in the past had not been effective in addressing her problem, and which was established in evidence, PDCT would be indicated. The plaintiff's expert conceded that PDCT which was non-standard treatment may be considered, if all other standard modalities like physical treatment, rehabilitation and analgesics had been tried to the optimum. Having considered the views of experts for both parties, and bearing in mind that the question of appropriate treatment was one which the court would defer to expert opinion, the court found that the PDCT procedure undertaken at the cervical region to address the plaintiff's complaints was acceptable treatment for her pain (see paras 44–45).

(3) Based on the evidence, the court found that the decision on whether an MRI ought to have been ordered was of no consequence as the MRI done post the PDCT did not show any change from the previous one. The omission to order an MRI was therefore an allegation which had no merit (see para 51).

(4) The rationale underlying the taking of consent was that a patient had a right to determine the treatment to be taken on her body after all due information had been given. The consent would encompass not only the information pertaining to the procedure itself, but the material risks and benefits of the procedure which the patient must be aware of. However, in the present case, the written consent form signed by the plaintiff appeared to be a general consent form, applicable to any procedure to be undertaken. Both the experts for the defence conceded that the medical records failed to mention the advice and information given to the plaintiff on the risks, nor the potential benefits of the procedure. Further, D2's oral evidence confirmed that the risk of increased pain following the PDCT was not explained to the plaintiff. Based on the above findings the court found that the plaintiff was not fully advised on the material risks and complications which otherwise would have constituted proper consent (see paras 53–54, 56 & 62–63).

(5) The evidence suggested that a needle breaking or bending during the PDCT procedure was not an uncommon occurrence. The court did not find any credible evidence adduced to establish negligent mishandling of the equipment nor any lack of skill on the part of D2 in conducting the PDCT procedure. The mere fact that the needle became bent during the PDCT procedure was not *ipso facto* negligence on the part of D2. In relation to D1, it ought to be noted that D1 did not own the PDCT machine used on the plaintiff as the machine was obtained by consignment from the suppliers. The fact that the needle became bent during the PDCT procedure could not be a reason to find negligence on the part of D1's hospital. There was no evidence establishing any lapse in the procurement or evaluating process prior to use. In the absence of such evidence, a finding of negligence against D1 was not warranted (see paras 66–67 & 69–70).

(6) With respect to the issue of causation, it was trite that for an action in negligence to succeed, the injuries suffered by the plaintiff must resulted from the breach of the defendants. The test of causation was equated to the 'but for' test, or more commonly stated as, but for the defendant's negligence, the injuries would not have occurred. Thus, a nexus must be proved between the alleged breach and the consequent injuries. Having undertaken an analysis of the opinion of both defence experts, the court was persuaded that the contributory cause of the unintended fusion at C5/C6 was not the PDCT procedure. There was no correlation between the PDCT and the cervical fusion. It was more likely to have been caused by a progression of her cervical spondylosis (see paras 71, 73, 76 & 84).

(7) In the present case, the plaintiff was initially the patient of one Dato' Dr Abdul Wahab. When she presented herself at D1's hospital, she was seen by D2 who was then covering for Dato' Dr Abdul Wahab. PDCT was

proposed then. She chose to see D2 for her follow up appointment and indicated her agreement to follow through the PDCT. The facts hardly call for a non-delegable duty of care to be imposed on D1. The fact that D1's hospital was the centre in which the PDCT was performed could not be construed as an assumption of a positive duty to protect the plaintiff from injury. Further, it would not be fair, just, and reasonable to impute such a duty because D2 was practicing in D1' hospital as an independent contractor at the material time. This was proven based on cll 7 and 11 of the consultancy agreement entered between D1 and D2 which showed that the responsibilities of both D1 and D2 were separate and distinct. In the circumstances, there was no reason to find D1 liable for the failure of D2 to advise on the material risks in undertaking the PDCT procedure (see paras 89–91 & 93).

(8) In relation to the plaintiff's claim for hospital and medical expenses, the medical bill for the PDCT procedure showed the sum of RM20,955.60, as such, the court awarded the said sum for medical expenses. The court had also allowed RM1,000 for travelling expenses for the plaintiff and her family to visit her post the PDCT procedure. The court further allowed 4% interest on the total amount of RM21,955.60 from 2 November 2019 to the date of judgment. The court disallowed the claim for loss of income because there was no documentary evidence to substantiate this claim. As for the claim for cost of medications, nutritional supplements etc, the court was not convinced on the evidence that all these costs arose as a consequence of the pain experienced from the PDCT procedure. It ought to be noted that special damages must be strictly proved (see paras 95–97 & 109).

(9) In respect to general damages, the court was guided by the well-established principle that damages for personal injuries were not punitive and still less a reward. They were intended to monetarily compensate the injured party reparation for the wrongful act and for all the natural and direct consequences of the act. There were no decided cases on point in respect of the same injury. However, having considered the amounts that the courts had awarded for more serious cases, the court considered RM25,000 a reasonable amount to compensate the plaintiff for the pain she experienced immediately after the PDCT. The court had allowed 8% interest on the said sum from 22 November 2019 (date of service of the writ) to the date of judgment. The court further ordered 5% interest on the sum adjudged from the date of judgment until the date of realization. As for the costs of treatments, the court found no basis upon which to award general damages for these treatments as the court did not find it warranted by the PDCT procedure (see paras 98, 100–101 & 109).

(10) Aggravated damages would be awarded where a defendant's tortious act was done in a manner which injured the plaintiff's feelings of pride and dignity, causing humiliation and distress. As the court had found that the PDCT was appropriate treatment, this puts paid to the allegation that the plaintiff was subjected to unnecessary treatment. Therefore, the court found that the claim for aggravated damages was without merit (see para 103).

(11) The court did not think that the facts in this case fell within the circumstances for a *Sanderson* order to be made. The plaintiff could not be said to be uncertain as to the party to sue for her injuries. Her statement of claim against both defendants pleaded specific and distinct particulars of negligence against both. She was aware of the terms of the consultancy agreement between both D1 and D2, which provided for D2 to take responsibility for any negligence suit filed. The court therefore declined to make a *Sanderson* order. The costs to be paid to D1 was to be borne by the plaintiff (see paras 106 & 109).

[Bahasa Malaysia summary

Plaintif dalam kes ini telah memfailkan tindakan terhadap Ampang Puteri Hospital Sdn Bhd ('D1') dan seorang doktornya ('D2') kerana kecederaan yang dialaminya berikutan prosedur yang dikenali sebagai percutaneous disc coagulation therapy ('PDCT') untuk merawat sakit leher dan sakit belakangnya. Prosedur PDCT tersebut telah dijalankan oleh D2 di hospital D1 tetapi prosedur tersebut tidak dapat diselesaikan kerana jarum yang digunakan untuk prosedur tersebut bengkok dalam percubaan ketiga D2 untuk menghantar laser pada tahap cakera C5/C6. Perlu diingat bahawa sebelum mendapatkan rawatan di hospital D1, plaintif telah dirawat di Hospital Pantai di mana MRI telah dilakukan, dan hasilnya menunjukkan ciri-ciri cervical spondylosis. Isu-isu yang timbul dalam kes ini adalah: (a) sama ada PDCT adalah rawatan yang boleh diterima untuk sakit leher dan belakang yang dialami oleh plaintif; (b) sama ada D2 telah menjalankan penyiasatan yang mencukupi ke atas plaintif sebelum PDCT — berhubung isu ini, plaintif berhujah bahawa D2 sepatutnya tidak meletakkan pergantungan kepada MRI yang dilakukan kira-kira 11 bulan yang lalu; (c) sama ada plaintif telah dinasihatkan dengan sewajarnya mengenai risiko, faedah dan komplikasi prosedur PDCT oleh D2; (d) sama ada prosedur PDCT telah dijalankan dengan betul oleh D2; (e) sama ada D1 cuai kerana gagal menyediakan sistem yang selamat untuk penyediaan penjagaan kesihatan; (f) sama ada PDCT menyebabkan atau menyumbang secara material kepada gabungan tulang belakang pada tahap C5/C6 dan meningkatkan risiko kemerosotan tulang belakang plaintif ('isu sebab-musabab'); dan (g) sama ada D1 bertanggungjawab ke atas perbuatan/peninggalan D2 — berkenaan dengan isu ini, plaintif berhujah bahawa D1 mempunyai kewajipan berhati-hati yang tidak boleh diwakilkan terhadap plaintif dan bahawa D1 bertanggungjawab

secara vikarius bagi perbuatan/peninggalan D2. Berkenaan dengan ganti rugi, plaintif menuntut: (i) ganti rugi khas untuk perbelanjaan hospital dan perubatan berjumlah RM50,000, kehilangan pendapatan berjumlah RM22,000 dan kos ubat-ubatan, makanan tambahan dan lain-lain; (ii) ganti rugi am untuk kesakitan dan penderitaan dalam jumlah RM150,000; dan (iii) ganti rugi teruk berjumlah RM200,000. Bagi kos, plaintif memohon agar *Sanderson order* dibuat.

Diputuskan, menolak tuntutan plaintif terhadap D1 dengan kos RM30,000 yang perlu dibayar oleh plaintif kepada D1 dan membenarkan tuntutan plaintif terhadap D2 dengan kos RM70,000 (dengan kos tambahan RM15,000 untuk permohonan interlokutori):

(1) Keputusan D2 untuk merawat aduan plaintif dengan PDCT adalah berkaitan dengan persoalan diagnosis dan rawatan. Ujian yang dikemukakan dalam *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 telah lama dianggap sebagai locus classicus oleh mahkamah Malaysia mengenai standard berhati-hati dalam hal diagnosis dan rawatan. Ujian *Bolam* pada dasarnya menyatakan bahawa seorang doktor tidak bersalah kerana cuai jika dia telah bertindak mengikut amalan yang diterima sebagai wajar oleh badan pendapat perubatan yang bertanggungjawab, walaupun terdapat kumpulan pendapat yang berpandangan sebaliknya (lihat perenggan 32).

(2) Semasa plaintif hadir ke Hospital Ampang Puteri, dia telah mengalami kesakitan selama kira-kira dua tahun sebelum ini. Kedua-dua pakar pihak pembelaan berpendapat bahawa jika rawatan konservatif pada masa lalu tidak berkesan dalam menangani masalahnya, dan telah dibuktikan dalam keterangan, PDCT akan dicadangkan. Pakar plaintif mengakui bahawa PDCT yang merupakan rawatan bukan standard boleh dipertimbangkan, jika semua kaedah standard lain seperti rawatan fizikal, pemulihan dan analgesik telah dicuba secara optimum. Setelah mempertimbangkan pandangan pakar-pakar untuk kedua-dua pihak, dan mengingati bahawa persoalan rawatan yang sesuai adalah persoalan yang mahkamah akan tangguhkan kepada pendapat pakar, mahkamah mendapati bahawa prosedur PDCT yang dijalankan pada bahagian serviks untuk menangani aduan plaintif adalah rawatan yang boleh diterima untuk kesakitan yang dialaminya (lihat perenggan 44–45).

(3) Berdasarkan keterangan, mahkamah mendapati bahawa keputusan sama ada MRI sepatutnya diarahkan adalah tidak memberikan apa-apa kesan kerana MRI yang dijalankan selepas PDCT tersebut tidak menunjukkan apa-apa perubahan daripada yang sebelumnya. Oleh itu, peninggalan untuk mengarahkan MRI adalah dakwaan yang tidak mempunyai merit (lihat perenggan 51).

(4) Rasional yang mendasari pengambilan persetujuan adalah bahawa pesakit mempunyai hak untuk menentukan rawatan yang akan diambil ke atas badannya selepas semua maklumat yang sewajarnya telah diberikan. Persetujuan tersebut bukan sahaja merangkumi maklumat yang berkaitan dengan prosedur itu sendiri, tetapi risiko material dan faedah prosedur yang mesti diketahui oleh pesakit. Walau bagaimanapun, dalam kes ini, borang kebenaran bertulis yang ditandatangani oleh plaintif kelihatan seperti borang kebenaran yang biasa, terpakai kepada mana-mana prosedur yang akan dijalankan. Kedua-dua pakar pihak pembelaan mengakui bahawa rekod perubatan gagal menyatakan nasihat dan maklumat yang diberikan kepada plaintif mengenai risiko, mahupun potensi manfaat prosedur tersebut. Selanjutnya, keterangan lisan D2 mengesahkan bahawa risiko peningkatan kesakitan berikutan PDCT tidak dijelaskan kepada plaintif. Berdasarkan dapatan-dapatan di atas, mahkamah mendapati bahawa plaintif tidak dinasihatkan sepenuhnya tentang risiko dan komplikasi material yang mana jika sebaliknya akan membentuk persetujuan yang sewajarnya (lihat perenggan 53–54, 56 & 62–63).

(5) Keterangan menunjukkan bahawa jarum patah atau lentur semasa prosedur PDCT bukanlah satu kejadian yang luar biasa. Mahkamah tidak menemui apa-apa keterangan yang boleh dipercayai yang dikemukakan untuk membuktikan kecuaian pengendalian peralatan atau kekurangan kemahiran di pihak D2 dalam menjalankan prosedur PDCT. Fakta bahawa jarum menjadi bengkok semasa prosedur PDCT bukanlah *ipso facto* kecuaian di pihak D2. Berhubung dengan D1, perlu diambil perhatian bahawa D1 tidak memiliki mesin PDCT yang digunakan pada plaintif kerana mesin tersebut diperoleh secara konsainan daripada pembekal. Fakta bahawa jarum menjadi bengkok semasa prosedur PDCT tidak boleh menjadi sebab untuk dapatan kecuaian di pihak hospital D1. Tiada keterangan yang membuktikan apa-apa kelewatan dalam proses perolehan atau penilaian mesin tersebut sebelum digunakan. Sekiranya tiada keterangan sedemikian, dapatan kecuaian terhadap D1 adalah tidak wajar (lihat perenggan 66–67 & 69–70).

(6) Berkenaan dengan isu sebab-musabab, adalah menjadi undang-undang yang mantap bahawa untuk tindakan kecuaian berjaya, kecederaan yang dialami oleh plaintif mestilah berpunca daripada pelanggaran defendan-defendan. Ujian sebab-musabab disamakan dengan ujian 'but for', atau lebih biasa dinyatakan sebagai, 'but for the defendant's negligence, the injuries would not have occurred'. Oleh itu, perhubungan mesti dibuktikan antara pelanggaran yang didakwa dan kecederaan yang diakibatkan. Setelah menjalankan analisis terhadap pendapat kedua-dua pakar pembelaan, mahkamah telah diyakinkan bahawa punca penyumbang percantuman yang tidak diingini pada

C5/C6 bukanlah prosedur PDCT tersebut. Tiada korelasi antara PDCT tersebut dan gabungan serviks. Ia lebih berkemungkinan disebabkan oleh perkembangan spondylosis serviksnya (lihat perenggan 71, 73, 76 & 84).

(7) Dalam kes ini, plaintif pada mulanya adalah pesakit kepada seorang Dato' Dr Abdul Wahab. Ketika dia datang ke hospital D1, dia diperiksa oleh D2 yang ketika itu menggantikan Dato' Dr Abdul Wahab. PDCT telah dicadangkan ketika itu. Dia memilih untuk berjumpa D2 untuk janji temu susulan dan menyatakan persetujuannya untuk menjalani PDCT. Fakta-fakta tersebut hampir tidak memerlukan kewajipan berhati-hati yang tidak boleh diwakilkan untuk dikenakan ke atas D1. Hakikat bahawa hospital D1 adalah pusat di mana PDCT dijalankan tidak boleh ditafsirkan sebagai andaian kewajipan positif untuk melindungi plaintif daripada kecederaan. Selanjutnya, adalah tidak adil, saksama dan munasabah untuk mengaitkan kewajipan sedemikian kerana D2 beramal di hospital D1 sebagai kontraktor bebas pada masa tersebut. Ini terbukti berdasarkan klausa 7 dan 11 perjanjian perundingan yang dimeterai antara D1 dan D2 yang menunjukkan bahawa tanggungjawab kedua-dua D1 dan D2 adalah berasingan dan berbeza. Dalam keadaan tersebut, tiada sebab untuk mendapati D1 bertanggungjawab atas kegagalan D2 memberi nasihat tentang risiko material dalam menjalankan prosedur PDCT (lihat perenggan 89–91 & 93).

(8) Berhubung dengan tuntutan plaintif untuk perbelanjaan hospital dan perubatan, bil perubatan untuk prosedur PDCT menunjukkan jumlah RM20,955.60, oleh itu, mahkamah mengawardkan jumlah tersebut untuk perbelanjaan perubatan. Mahkamah juga membenarkan RM1,000 untuk perbelanjaan perjalanan untuk plaintif dan keluarganya melawatnya selepas menjalani prosedur PDCT. Mahkamah seterusnya membenarkan faedah 4% ke atas jumlah keseluruhan RM21,955.60 mulai 2 November 2019 hingga tarikh penghakiman. Mahkamah tidak membenarkan tuntutan kehilangan pendapatan kerana tiada keterangan dokumentari untuk menyokong tuntutan ini. Bagi tuntutan kos ubat-ubatan, suplemen pemakanan dan lain-lain, mahkamah tidak yakin dengan keterangan bahawa semua kos ini timbul akibat kesakitan yang dialami daripada prosedur PDCT. Perlu diingatkan bahawa ganti rugi khas perlu dibuktikan dengan tegas (lihat perenggan 95–97 & 109).

(9) Berkenaan dengan ganti rugi am, mahkamah berpandukan prinsip yang telah mantap bahawa ganti rugi untuk kecederaan peribadi bukanlah punitif dan bukan ganjaran. Ganti rugi tersebut bertujuan untuk membayar pampasan secara kewangan bagi pembetulan oleh pihak yang cedera untuk perbuatan yang salah dan untuk semua akibat semula jadi dan langsung dari perbuatan tersebut. Tiada kes yang diputuskan

mengenai kecederaan yang sama. Bagaimanapun, setelah mempertimbangkan amaun yang telah mahkamah-mahkamah berikan untuk kes-kes yang lebih serius, mahkamah ini menganggap RM25,000 sebagai jumlah yang munasabah untuk membayar pampasan kepada plaintif atas kesakitan yang dialaminya sejurus selepas PDCT tersebut. Mahkamah telah membenarkan 8% faedah ke atas jumlah tersebut dari 22 November 2019 (tarikh penyampaian writ) hingga tarikh penghakiman. Mahkamah seterusnya memerintahkan faedah 5% ke atas jumlah yang dihakimi dari tarikh penghakiman sehingga tarikh realisasi. Bagi kos rawatan, mahkamah tidak menemui asas untuk memberikan ganti rugi am untuk rawatan ini kerana mahkamah tidak mendapati ia wajar oleh prosedur PDCT (lihat perenggan 98, 100–101 & 109).

(10) Ganti rugi teruk akan diberikan di mana perbuatan tort defendan telah dilakukan dengan cara yang mencederakan perasaan bangga dan maruah plaintif, menyebabkan kehinaan dan kekecewaan. Memandangkan mahkamah telah mendapati bahawa PDCT adalah rawatan yang sewajarnya, ini menafikan dakwaan bahawa plaintif telah dikenakan rawatan yang tidak perlu. Oleh itu, mahkamah mendapati bahawa tuntutan ganti rugi teruk adalah tanpa merit (lihat perenggan 103).

(11) Mahkamah tidak rasa bahawa fakta dalam kes ini adalah termasuk dalam keadaan untuk *Sanderson order* dibuat. Plaintif tidak boleh dikatakan tidak pasti mengenai pihak yang perlu disaman di atas kecederaan yang dialaminya. Pernyataan tuntutannya terhadap kedua-dua defendan memplid butir-butir kecuaian yang spesifik dan jelas terhadap kedua-duanya. Dia mengetahui terma perjanjian perundingan antara D1 dan D2, yang memperuntukkan D2 untuk bertanggungjawab ke atas apa-apa saman kecuaian yang difailkan. Oleh itu mahkamah enggan membuat *Sanderson order*. Kos yang perlu dibayar kepada D1 adalah ditanggung oleh plaintif (lihat perenggan 106 & 109).]

Cases referred to

Besterman v British Motor Cab Company, Limited [1914] 3 KB 181, CA (refd)

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, QBD (refd)

Chua Teck Chew Robert v Goh Eng Wah [2009] SGCA 40; [2009] 4 SLR 716, CA (refd)

Dominic Puthucheary & Ors (personal representatives of the estate of Thayalan a/l Kanapathipillai) v Dr Goon Siew Fong & Anor [2007] 5 MLJ 552, CA (refd)

Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281, FC (refd)

Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal [2018] 1 MLJ 685, FC (refd)

Elizabeth Chin Yew Kim & Anor v Dato' Ong Gim Huat (sued as public officer of Hospital Lam Wah Ee) and other appeals [2017] 1 MLJ 328, CA (refd)

Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593, FC (refd)
Norazleen bt Mohammed Mustaffa v Dr Omar Md Isa & Anor [2015] MLJU 2313; [2015] 4 CLJ 474, CA (refd)
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324, FC (refd)
Rookes v Barnard [1964] AC 1129, HL (refd)
Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 2 MLJ 1, FC (folld)
Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors [2017] 5 MLJ 438, FC (refd)

Legislation referred to

Rules of Court 2012 O 59 r 3(2)

Manmohan S Dhillon (with Jeremy Balang) (PS Ranjan & Co) for the plaintiff.
Amos Siew Yih Jhien (with Tan Pui Yi) (Azim, Tunku Farik & Wong) for the first defendant.
Harikannan Ragavan (with Puspanathan) (Jayadeep Hari & Jamil) for the second defendant.

Alice Loke J:

INTRODUCTION

[1] The plaintiff sues the defendants for the injuries she sustained following a procedure known as percutaneous disc coagulation therapy ('PDCT') to manage her neck and back pain. The PDCT was done at the Ampang Puteri Hospital in 2016.

BACKGROUND FACTS

[2] The plaintiff is herself a doctor. At the material time, she was attached to the Emergency Department of Hospital Kuala Lumpur. She has a history of cervical spondylosis. Prior to seeking treatment at Ampang Puteri Hospital, she was seen at Pantai Hospital.

[3] On 20 September 2016, she presented herself at Ampang Puteri Hospital, managed, with complaints of neck pain, stiffness and weakness in her right hand. She was already a patient of Dato' Dr Abdul Wahab bin Abdul Ghani ('PW6'), having been under his care prior to that date. However, on this occasion, he was on leave. She was referred to the second defendant ('D2'), who was then covering for PW6.

[4] She was admitted and treated conservatively. D2 prescribed medication to manage her pain. Physiotherapy was also advised. D2 offered her the PDCT procedure to manage her pain when the plaintiff informed of her busy work

schedule. He further assured her that no operation was necessary to manage her pain. The plaintiff was discharged on 22 September 2016.

[5] On 6 October 2016, the plaintiff turned up for her follow up appointment. She was seen by D2. She informed him that she agreed to undergo the PDCT. The procedure was then scheduled for early November.

[6] On 1 November 2016 the plaintiff was admitted for the PDCT procedure to be undertaken the following day. The plaintiff signed the written consent form.

[7] Unfortunately, the procedure was not completed. The medical records show that D2 had delivered two doses of the laser at the C5/C6 disc level when at the third attempt, the needle bent. It was documented 'laser break, needle bent' in the medical notes. D2 then stopped the procedure and instructed for the plaintiff to be transferred to the recovery ward.

[8] The plaintiff complained of severe pain while she was in the ward. She was given pain relief intravenously. Her father contacted Dato' Dr Abdul Wahab who visited her while she was in the ward. Her parents noted her extreme discomfort upon seeing her.

[9] The plaintiff was discharged two days later, on 4 November 2016. She was given a month's supply of Arcoxia, a pain killer. She returned to see D2 on 11 November 2016. She complained to him that her pain had become worse following the PDCT. D2 requested her to come again in two weeks' time for a follow up appointment. The plaintiff failed to turn up.

[10] On 22 December 2016 the plaintiff returned to Ampang Puteri Hospital. She presented herself at the Emergency Department with complaints of worsening neck and upper back pain. On this occasion, she was seen by Dato' Dr Abdul Wahab.

[11] On 24 December 2016, an MRI was done for her back region. The findings of the MRI showed the plaintiff to have cervical spondylosis and disc prolapse at C5/C6. The plaintiff was discharged on 27 December 2016, again with a one-month prescription of Arcoxia.

[12] Slightly more than a month later, on 7 February 2017, she sought treatment at the Prince Court Medical Centre, with complaints of posterior upper neck pain and upper back pain as well as occipital headaches.

[13] The plaintiff claims that she now suffers from the following injuries as

particularised in her statement of claim:

(a) spinal fusion at the C5/6 level;

(b) loss of cervical lordosis;

(c) a worsening of the cervical spondylosis, disc prolapse and degenerative thoracic disc disease;

(d) chronic pain and discomfort following the unnecessary and incomplete PDCT procedure;

(e) cervical pain;

(f) weakness of the left grip;

(g) reduced range in motion;

(h) terderness bilaterally over the midcervical region; and

(i) pain over the trapezius bilaterally.

THE PLAINTIFF'S CASE

[14] Numerous allegations of negligence were pleaded in the plaintiff's amended statement of claim against both the defendants. At the conclusion of the trial, and based on the evidence adduced, the allegations had somewhat been narrowed and they are as follows.

[15] Firstly, D2 failed to perform an adequate clinical examination of the plaintiff to diagnose the source of her pain before undertaking the PDCT. D2 should have advised for a more recent MRI as her last MRI was almost a year prior. D2 failed to give her the option of undergoing an alternative treatment. As the PDCT procedure is a non-conventional intervention, conservative treatment ought to have been offered to the plaintiff. PDCT is not standard treatment for cervical spondylosis in most facilities. The spinal fusion at C5/6 was most likely due to the PDCT treatment at that level.

[16] Secondly, D2 ought to have explained the risks, benefits and complications of the PDCT procedure, but he failed to. The medical records did not show that the plaintiff was properly advised, particularly as to the risk of the needle breaking and the unintended spinal fusion.

[17] Thirdly, D2 failed to properly perform the PDCT procedure, resulting in the needle being bent.

[18] As against the hospital ('D1'), the plaintiff claims that as a health care provider, it had failed to provide a safe, reliable and effective system of work for the treatment of the plaintiff. Apart from this, there were also allegations of

failure and omission in the clinical treatment and management of the plaintiff.

[19] The plaintiff also seeks to hold D1 liable as the employer of D2 at the material time. Notwithstanding the consultancy agreement entered into between D1 and D2, it did not tend to show that D2 was an independent contractor. Their relationship was more akin to an employer-employee relationship.

[20] In addition, the duties owed by D2 towards the plaintiff are non-delegable, and D2 was in breach of these duties of care.

D2'S DEFENCE

[21] I shall now deal with the defences relied on by the defendants. As D2 was the treating doctor at the material time, I propose to deal with his defence first.

[22] In essence, the defence case is that PDCT is acceptable management and was indicated as the plaintiff continued to have persistent pain even after conservative treatment. The plaintiff's condition of cervical fusion did not result from the PDCT. It fused as a natural progression of her degenerative condition.

[23] The plaintiff was duly advised about the PDCT procedure. The material risks and complications were explained to her.

[24] A repeat MRI prior to the PDCT was not necessary as the symptoms experienced by the plaintiff were similar to that experienced when she had a MRI done at Pantai Hospital a year ago.

D1'S DEFENCE

[25] D1 contends that PDCT is an accepted practice for pain management.

[26] D1 denies any failure on its part to provide a safe healthcare system at the material time. D2 had in place a system to ensure that the equipment used by its doctors, including the equipment for the PDCT procedure was functioning properly.

[27] The PDCT procedure undertaken by D2 was purely one undertaken in his clinical judgment for which D1 cannot be made responsible. Similarly, the other allegations of negligence pertaining to the giving of advice and conducting the necessary investigations on the plaintiff prior to the PDCT are

clinical matters for which D2 as the independent contractor is to be responsible for.

[28] Finally, the question of vicarious liability does not arise as D2 was neither its employee nor servant. The facts of this case did not warrant the imposition of a non-delegable duty of care on the part of D1. In defence of the suit, D1 has also filed a notice seeking contribution and indemnity against D2.

ISSUES FOR DETERMINATION

[29] I shall deal first with the issue of liability. Arising from the respective positions taken by the parties, the court has to determine the following issues:

(a) whether PDCT is acceptable management for the neck and back pain experienced by the plaintiff;

(b) whether D2 had conducted adequate investigation on the plaintiff prior to the PDCT;

(c) whether the plaintiff was duly advised on the risks, benefits and complications of the PDCT procedure by D2;

(d) whether the PDCT procedure was properly conducted by D2;

(e) whether D1 was negligent in failing to provide a safe system for healthcare provision;

(f) whether the PDCT caused or materially contributed to the fusion of the spine at level C5/C6 and increased the risk of the plaintiff's spine degeneration; and

(g) whether D1 is liable for the acts/omissions of D2.

ANALYSIS AND DECISION OF THIS COURT

Whether the PDCT is acceptable management for the plaintiff's pain

[30] The plaintiff's condition prior to the PDCT is not in dispute. She had been experiencing chronic neck pain for two years, with periods of exacerbation. The MRI performed in Pantai Hospital prior to her visit to D2 confirmed features of cervical spondylosis. Cervical spondylosis is a general term to indicate wear and tear affecting the cervical spinal column. There was disc bulge noted at C4/C5 and disc protusion at C5/C6, with no neural compromise.

[31] The PDCT procedure involves several image-guided techniques such as radio frequency or laser, and is meant to ablate or remove protruding intervertebral discs.

[32] D2's decision to treat the plaintiff's complaints by PDCT pertains to the question of diagnosis and treatment. The test propounded in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 has long been held to be the *locus classicus* by the Malaysian courts on the standard of care in matters of diagnosis and treatment. The *Bolam*'s test essentially states that a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical opinion, even if there is a body of opinion that holds a contrary view.

[33] However, in recent times, there have been several conflicting decisions on the applicable test. The opportunity to re-state the law arose in *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] 5 MLJ 438 where the Federal Court stated as follows:

> [94] Thus, it is our judgment that in respect of the standard of care in medical negligence cases, a distinction must be made between diagnosis and treatment on the one hand and the duty to advise of risks on the other. This is because diagnosis and treatment are purely in the realm of medicine and that in the field of medicine, there are genuine differences of professional opinion in respect of diagnosis and treatment. Although as a discipline, medicine involves specific knowledge, its practice, however, often does not admit to scientific precision. It is not always the case that there is a definite answer one way or the other. In fact, medical experts do genuinely and frequently differ in opinion on diagnosis and treatment.
>
> [95] Given the fact that there are genuine differences in opinion in diagnosis and treatment, it is therefore not a matter that the court can, or is, equipped to resolve. It is in this context that the *Bolam* test makes good sense. It requires the court to accept, not just the views of medical experts simpliciter, but the views of a responsible body of men skilled in that particular discipline. It removes from the courts the responsibility of resolving a dispute that is not equipped to resolve.

(See also: *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281 (FC)).

[34] The courts now recognise that on matters pertaining to treatment, doctors do not always agree. There will invariably be differences of opinion with regard to what is considered appropriate treatment. However, the courts will defer to expert opinion, as doctors themselves are best placed to comment on the treating doctor's management of the patient.

[35] Bearing in mind the *Bolam* test as affirmed above, I shall now deal with the first issue, whether the PDCT procedure undertaken was indicated and whether it is accepted practice to manage the pain experienced by the plaintiff. The PDCT done on the plaintiff was at the C5/C6 level of her spine.

[36] The expert evidence for the plaintiff was adduced by Professor Dharmendra Ganesan ('PW1') a Senior Consultant Neurosurgeon, attached

to the University of Malaya. He was not in support of the PDCT procedure undertaken. I refer to his opinion stated in both his reports dated 5 August 2020 and 27 April 2021 respectively. The relevant portions on this issue are set out as follows:

> The structural changes in the MRI only indicate cervical spondylosis. The PDCT treatment modality that was offered is not conventional treatment for cervical spondolysis. PDCT is a rather invasive procedure as the needle is advanced anteriorly into the disc space. The technique is used in certain centres, but the literature is still sparse on the genuine indication and benefit of this procedure.
>
> The cervical PDCT is not standard care for the treatment of cervical spondylosis. The technique is used sporadically in various units. The existing literature for this particular technique 'cervical disc coagulation therapy' is scanty. In my view, the supporting evidence of safe use of this procedure in the cervical spine is not robust. There seems to be some literature of this technique in the lumbar spine.

[37] Dato' Dr Wahab Abdul Ghani, who treated the plaintiff initially at Ampang Puteri Hospital, was called to testify for the plaintiff. In cross, he was asked regarding PDCT. He said that he had personally undertaken several such procedures for his patients. He stated affirmatively that he would have recommended the same to the plaintiff.

[38] Contrary to the position taken by the plaintiff's expert, the experts called by D1 and D2 opined that the PDCT procedure is accepted practice for pain management.

[39] D1's expert was Dato' Dr KS Sivananthan ('DW2'), a Consultant in Trauma and Orthopaedic Surgery with Fatimah Hospital, Ipoh. He was unequivocal in his views that it was accepted medical practice to undertake PDCT for pain management. He supported his views with medical literature on the subject. The literature he referred to stated that PDCT is considered to be an effective therapy and may result in a satisfactory outcome.

[40] In cross-examination, the plaintiff's counsel challenged DW2's reliance on the literature he referred to. It was put to him that the literature suggests PDCT to be indicated for lumbar region of the spine, rather than the cervical region. DW2 disagreed. He stated that he had used the PDCT equipment on the cervical region before. He then explained the context of the statement in the literature. He stated that the equipment mentioned in the literature was that used for the lumbar spine. On the other hand, the equipment for the cervical region is different. The notes of proceedings record his evidence as this:

> MSD: Dato', firstly, this equipment according to the literature have been used for the lumbar spine.
>
> DW2: No. It has been used for (sic) the equipment that is used for this cervical spine and lumbar spine are different. The needles are different. So the cervical spine, if

A they want to bring this procedure for the cervical spine, where the needle is much smaller than the lumbar spine, it has to be approved by the Ministry of Health. So, don't say this procedure cannot be used in the cervical spine because I completely disagree with that because personally, I have used it for cervical spine.

B **[41]** He had therefore explained the reservations stated in medical literature referred to. Having considered his opinion, I do not find his evidence successfully challenged in cross-examination.

C **[42]** DW2 further added that there was no contraindication for the PDCT procedure in the plaintiff's case. Her disc problem was merely a bulging disc and not a sequestrated disc. The plaintiff had minimal neurological problems. There was therefore nothing to suggest that the PDCT was not appropriate treatment for her.

D **[43]** D2's expert was Dr Vivekananda Navaratnam ('DW4'), a Consultant Orthopaedic Surgeon at the Assunta Hospital. He held a similar view in that PDCT was indicated for this patient. I refer to his written expert opinion in which he stated as follows:

E PDCT is a procedure that is done when the patient has persistent pain after conservative treatment for pain relief. Since the disc was contained and no radiculopathy, PDCT is indicated for this patient.

F **[44]** At the time the plaintiff presented herself at the Ampang Puteri Hospital, she had been in pain for about two years prior. Both the defence experts opined that if conservative treatment in the past had not been effective in addressing her problem, and which was established in evidence, PDCT would be indicated. The plaintiff's expert conceded that PDCT which is G non-standard treatment may be considered, if all other standard modalities like physical treatment, rehabilitation and analgesics had been tried to the optimum.

[45] Having considered the views of experts for both parties, and bearing in H mind that the question of appropriate treatment is one which the court will defer to expert opinion, I find that the PDCT procedure undertaken at the cervical region to address the plaintiff's complaints is acceptable treatment for her pain.

I *Whether proper investigation was done prior to the PDCT procedure*

[46] The plaintiff had an MRI done at Pantai Hospital in October 2015. D2 did not order for an MRI prior to the PDCT procedure. The plaintiff

questioned this omission, alleging lack of proper investigation. She alleged that D2 ought not to have placed reliance on a radiological imaging done some 11 months prior.

[47] The plaintiff's expert stated in his evidence that one year was considered a reasonably long time and if the symptomology had changed, a treating doctor may want to do an MRI. He further added:

> If you're managing her conservatively, the old MRI would perhaps give you an impression of what you're dealing with. If you wanted to intervene, doing a procedure, a new MRI would have been very much helpful but if the symptoms had not changed very much and it was almost similar to what it was in 2015, you can make a case to say, 'Okay, fine, we use that as a basis' but I agree, I mean most centers they would repeat another scan before they do an intervention for a patient.

[48] I surmise from his evidence that a repeat MRI would not be necessary if there were no obvious changes in the symptoms. The plaintiff's expert did not state it was imperative for D2 to do another MRI. He was rather circumspect in his views on this issue by merely stating that it would be helpful in the treatment plan.

[49] On the other hand, Dr Vivekananda categorically stated that an MRI prior to the PDCT was not warranted. DW4 said that since the plaintiff was seen at Ampang Puteri less than a year from the MRI at Pantai Medical Center with axial neck pain and no neuropathic symptoms, a repeat MRI was not justified.

[50] Subsequent to the PDCT, an MRI was done on 23 December 2016. Having viewed the both MRIs done at the Pantai Hospital and Ampang Puteri Hospital, Dato' Sivananthan was of the view that the findings were essentially similar. The mild disc prolapse at C5/C6 and disc bulge at C4/C5 seen earlier was present with no spinal cord compression.

[51] On the evidence therefore, I find that the decision on whether an MRI ought to have been ordered is of no consequence as the MRI done post PDCT did not show any change from the previous one. The omission to order an MRI is therefore an allegation which had no merit.

Whether the plaintiff was properly advised on the risks, benefits and complications of the PDCT procedure

[52] The test in *Bolam* has no application in matters pertaining to the issue of consent. In *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593, the Federal Court held as follows:

> [36] That said, we are of the opinion that the *Bolam* Test has no relevance to the duty

A and standard of care of a medical practitioner in providing advice to a patient on the inherent and material risks of the proposed treatment. The practitioner is duty bound by law to inform his patient who is capable of understanding and appreciating such information of the risks involved in any proposed treatment so as to enable the patient to make an election of whether to proceed with the proposed
B treatment with knowledge of the risks involved or decline to be subjected to such treatment.

(See also: *Norazleen bt Mohammed Mustaffa v Dr Omar Md Isa & Anor* [2015] MLJU 2313; [2015] 4 CLJ 474 (CA).)

C

[53] Undeniably, the written consent form signed by the plaintiff did not disclose much information save for what was contained therein. Having scrutinized it, the complaint of the plaintiff has some validity. It appears to be a general consent form, applicable to any procedure to be undertaken.

D

[54] Both the experts for the defence conceded that the medical records failed to mention the advice and information given to the plaintiff on the risks, nor the potential benefits of the procedure. D2 himself personally admitted as much in his oral evidence. Notwithstanding the fact that it was not
E documented, he stated in his oral evidence that it was verbally explained to the plaintiff during her visits prior to the procedure.

[55] The plaintiff in her oral evidence claimed that D2 merely gave a brief explanation as to the procedure involved. D2 told her the procedure was low
F risk. He further said that the procedure was a simple one which would provide her pain relief. However, he omitted to mention any potential risks associated with the procedure.

G **[56]** The rationale underlying the taking of consent is that a patient has a right to determine the treatment to be taken on her body after all due information has been given. The consent would encompass not only the information pertaining to the procedure itself, but the material risks and benefits of the procedure which the patient must be aware of.

H

[57] Nonetheless, I have also considered the evidence showing that the plaintiff was not entirely ignorant about the PDCT procedure. The medical notes on 21 September 2016 showed that the plaintiff expressed her wish to discuss with family members before coming to a decision on the procedure. She
I was also a qualified doctor at the material time. It was also in evidence that two days after her discharge on 22 September 2016, she consulted Dato' Dr Fazir at the Tawakal Hospital. Whilst this evidence does not detract from the duty of D2 to explain to the plaintiff the risks and benefits of the procedure, it does suggest that the plaintiff had, to some extent, educated herself on the PDCT.

[58] Dr Vivekananda stated in his expert report that:

> During any surgical procedure the instrument can malfunction. The plasma coagulation use very fine fibres. The fibres can break if not handled properly. There should have been a spare fibre so that the procedure could have been completed properly.

[59] Dato' Sivananthan's opinion on D2's actions upon the needle having bent was:

> Dr Nurul Azwa did the right thing to abandon the procedure when he found that the needle was bent. This is expected of any orthopaedic surgeon during this procedure. His actions have not contributed to the current status of the patient.

[60] From the evidence of the experts, I find that the occurrence of a bent needle during the PDCT procedure is a known risk. However, I do not find evidence of the risk explained to the plaintiff from either the consent form or the oral evidence of D2.

[61] There is also evidence to suggest that the plaintiff experienced heightened pain immediately thereafter. She testified that she was in excruciating pain. Her evidence was supported by that of her parents who visited her on the same day at the hospital. The plaintiff's mother testified to seeing her daughter in extreme distress. Dato' Dr Abdul Wahab was called by her father, who then came to see her. Upon her discharge, she was given one-month supply of pain killers. To that extent, I am satisfied that there was a certain degree of pain suffered immediately after the procedure. I can find no other reason for the pain than the procedure itself.

[62] The risk of increased pain following the PDCT was not explained to her. D2's oral evidence confirmed this when he said the material risks and complications were explained, including the risk of infection and nerve root injury. Apart from these two risks, he did not state what other possible risks were explained to her. I thereby conclude that the risk of increased pain was not mentioned.

[63] To conclude the issue of consent, I find that the plaintiff was not fully advised on the material risks and complications which otherwise would have constituted proper consent.

Whether the PDCT procedure was properly conducted by D2

[64] Dato' Sivananthan explained that the needle could possibly have bent during the PDCT as the disc at C5/6 was hard and calcified. D2 in cross said that it was possible for the needle to become bent due to the heat transfer to the

A disc. D2 explained that the disc at C5/6 was burnt twice at 150 joules. As he was delivering the third burn, the laser fibre broke and the needle of the instrument bent. As it was not possible to proceed further, he stopped the procedure and had the plaintiff transferred to the recovery ward for assessment. He exercised his judgment to end the procedure.

B

[65] Dato' Sivananthan stated that when such an event happens, force should not be applied further as it might cause damage to the surrounding structures. When the needle became bent, it was prudent for D2 to abandon the procedure.

C

[66] Dr Vivekananda stated that while he agreed with the management of the plaintiff by D2, he would nevertheless have ensured a spare needle was available during the procedure. This suggests that a needle breaking or bending is not an uncommon occurrence.

D

[67] I do not find any credible evidence adduced to establish negligent mishandling of the equipment nor any lack of skill on the part of D2 in conducting the PDCT procedure. The mere fact that the needle became bent during the PDCT procedure is not *ipso facto* negligence on the part of D2.

E

Whether D1 was negligent in failing to provide a safe system of healthcare

[68] The plaintiff alleged that Ampang Puteri Hospital was responsible to ensure the safety of any equipment used on her. It had to evaluate the equipment first before allowing it to be used in clinical practice.

F

[69] Ampang Puteri Hospital did not own the PDCT machine used on the plaintiff. It was obtained by consignment from the suppliers. Evidence on the practice of procuring of the PDCT machine was given by Encik Omar Zakir ('DW1'), the operations manager of Ampang Puteri Hospital. He stated that the hospital had in place a procedure for evaluation of any medical equipment prior to use. This will be done by the Biomedical Unit of the hospital. Upon inspection, it will then sanction the equipment for use.

G

H

[70] The fact that the needle became bent during the PDCT procedure cannot be a reason to find negligence on the part of hospital. There is no evidence establishing any lapse in the procurement or evaluating process prior to use. In the absence of such evidence, a finding of negligence against D1 is not warranted.

I

Whether the PDCT caused or materially contributed to the fusion of the spine at level C5/C6 and increased the risk of the plaintiff's spine degeneration

[71] It is trite that for an action in negligence to succeed, the injuries suffered by the plaintiff must result from the breach of the defendants.

[72] The plaintiff subsequently went for two MRIs in 2019 and 2021, both of which showed that her cervical spine had fused at the C5/C6 level. She claims that her present condition was caused by the PDCT procedure. As a consequence of the fusion, she also claims she is now at a higher risk of suffering from adjacent level deterioration of her cervical spine.

[73] The issue raised is therefore one of causation. In such a case, the onus is on the plaintiff to prove that the defendants actions caused the plaintiff's injuries. The test of causation is equated to the 'but for' test, or more commonly stated as, but for the defendant's negligence, the injuries would not have occurred.

[74] Counsel for the plaintiff submitted that she is not required to prove that the defendants' breach of duty is the sole or primary cause of the present condition. Suffice if the injuries were materially contributed to by the defendants' breach. I agree with the submission and am guided by the authority referred to by counsel, where the Federal Court in *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1 held as follows:

> [36] In the light to these authorities, we are of the view that the 'but for' test is not the exclusive test to be applied to determine causation of the injury. It can still be applied but not in circumstance when there are two or more acts or events or factors that could or contribute to the injury of the plaintiff. This instant case is a case in point where evidence is established that there are a multiple of factors that could bring about the injury to the plaintiff. And to decide whether there is causation in these circumstances the approach of Lord Reid in *Bonnington Casting Ltd v Wardlaw:* whether any of these acts or events or factors has materially contributed to the plaintiff's injury should be adopted. What is a material contribution must be a question of degree. This is for the court to decide but certainly anything that is trifle is not material. As Lord Reid in the same case expounded: 'contribution which comes within the exception of *de minimis non curat lex* (the law does not concerns itself with trifles) is not material'.

[75] In the context of medical negligence cases, the courts have held that a plaintiff is merely to prove that it was 51% likely that the defendant's negligent act injured the plaintiff. In *Elizabeth Chin Yew Kim & Anor v Dato' Ong Gim Huat (sued as public officer of Hospital Lam Wah Ee) and other appeals* [2017] 1 MLJ 328, the Court of Appeal held:

> [34] The principle of causation is concerned with the relationship between the tortious act and the injury sustained. There must be a causal connection between the breach of duty and the injury suffered. Now proof of causation can often be

A onerous for the injured patient as he or she is in most cases in a disadvantaged position when compared to the treating medical practitioner.

[35] Nevertheless, the law places a burden on the plaintiff to prove on a balance of probabilities, as in the instant case, that it was the first defendant's breach of duty which caused the injuries to the infant. Put another way, there must be proof that if B there was no breach by the first defendant in his failure to apply the McRobert's manoeuvre and supra-pubic pressure, the infant would not have suffered the injuries that were sustained.

[36] In this regard, the courts often look to the test of causation commonly known as the 'but for' test. It simply means that 'but for' the defendant's negligent act, the C injury would not have occurred. It is in essence a factual inquiry and in medical negligence cases it is often resolved through expert evidence.

[37] We must emphasise that proof on the balance of probabilities simply means proving that something was more likely than not to have occurred. There is no burden to prove with 100% certainty that it was the first defendant's breach which D led to the injury. The plaintiff only needs to prove that it was at least 51 % likely that it was so. Especially in medical negligence cases, where medicine is not yet an exact science, exact conclusions are unrealistic.

(See also: *Dominic Puthucheary & Ors (personal representatives of the estate of* E *Thayalan a/l Kanapathipillai) v Dr Goon Siew Fong & Anor* [2007] 5 MLJ 552.)

[76] The authorities thus establish that a nexus must proved between the alleged breach and the consequent injuries. I shall now examine the evidence adduced on the issue of causation. Reference is again made to the opinion of F the experts.

[77] The material portion of the written opinion of the plaintiff's expert, Professor Dr Dhamendra states:

G The PDCT was done on 2nd November 2016 at the level of C5/C6. About 2 years and 6 months later, the radiograph in May 2019 detected C5/C6 disc space has calcified and fused.

The other disc spaces are maintained.

Hence, it would be sensible to conclude the C5/C6 fusion is sequelae of the PDCT H treatment at that C5/C6 level.

...

However, one of the long term consequences of cervical vertebral fusion is adjacent segment disc degeneration due to increased stress and 'wear tear' because of the increased motion and stress on the discs at the adjacent levels namely C4/5 and I C6/7 to compensate for the fused C5/6 segment which has lost its motion.

[78] In short, the plaintiff's expert was certain that the cervical fusion at C5/6 was caused by the PDCT procedure. Apart from his assertion as to the probable cause, there was no reason proffered for coming to this conclusion.

There is no convincing evidence before me to substantiate that conclusion. In addition, PW1 made the conclusion based on radiographs in May 2019, more than two years after the procedure. I am not persuaded that a causal connection had been established between the PDCT and the cervical fusion at C5/6.

[79] On the other hand, the defendants' experts were confident that the PDCT did not cause any deterioration in the plaintiff's condition. Dato' Sivananthan's report states:

> This patient had cervical spondylosis and her condition had not deteriorated after the procedure undertaken by Dr Nurul Azwa because the MRI findings done on 19.10.2015 and the MRI done by Dato' Dr Wahab Ghani on 23.12.2016 was essentially similar. As such the progression of degeneration of the cervical spine was not accelerated by the procedure Dr Nurul Azwa had done.
>
> Her disability is due to the natural degenerative changes that she had in the cervical spine.

[80] The same conclusion was expressed by Dr Vivekananda. He was also of the view that the disc fusion was a natural progression of her existing problem. He considered it to be highly unlikely that the plaintiff's condition worsened after the PDCT procedure.

[81] The relevant portion of his written opinion dated 28 October 2020 reads:

> Cervical spondylosis is a chronic degenerative condition and naturally tend to progress. She was having chronic neck pain for a few years even before seeing Dr Nurul Azwa. The cervical disc became more degenerated and eventually the disc thickness reduces, osteophyte formation, facet joint arthritis and thickening of ligament flavum. Eventually the cervical disc tend to fuse naturally. The thoracic disc degeneration has nothing to do with the procedure she underwent. We can conclude that she has degeneration of disc along the whole spine, evidenced by the MRI scan done in Pantai Medical Centre and Ampang Puteri Specialist Hospital. There is no evidence from the notes that patient has weakness of her left hand grip. The latest MRI done in December 2016 did not show any evidence of nerve root impingement. The reduced range of motion of her neck is due to the progression of the cervical spondylosis with facet arthritis. The pain over her trapezius and mid cervical region were there before the procedure was performed. It is part of the pain distribution from the disc disease at C5/6.

[82] Subsequent to the above written opinion, Dr Vivekananda examined the plaintiff sometime in July 2021. His written opinion dated 27 August 2021 states as follows:

> I have to agree that the PDCT has enhanced the fusion at C5/6. However, this fused segment has caused minimal restriction of movement of the spine. Fusion is common for disc disease and it is noted that single level fusion does not cause much

A restriction of movement. It is also noted that patient with cervical spondylosis will have some restriction of movement of the cervical spine.

B **[83]** Notwithstanding his statement that fusion was contributed to by the PDCT, I do not find any reasons in his report for arriving at this conclusion. In any event, he did not find it to be materially caused by the PDCT. He also did not find the fusion to have caused much disability to the plaintiff in terms of restriction of movement. In view of her pre-existing condition, the plaintiff would, in any event, experience some restriction of movement.

C

[84] Having undertaken an analysis of the opinion of both defence experts, I am therefore persuaded that the contributory cause of the unintended fusion at C5/6 was not the PDCT procedure. There is no correlation between the PDCT and the cervical fusion. It is more likely to have been caused by a
D progression of her cervical spondylosis.

[85] Although both the defence experts agree that the cervical fusion at C5/6 would increase the risk of accelerated deterioration at the adjacent segments, the risk of this injury is relevant only if it is proven to have resulted from either
E of the defendants' breach of duty. As I have not found it to be so, the question of the defendants causing the plaintiff to suffer an increased risk of adjacent segment degeneration does not arise.

F **[86]** To establish the severity of the plaintiff's current condition, the plaintiff adduced evidence through Dr Ozlan Izma bin Muhamed Kamil ('PW2'), a Consultant Orthopaedic and Spine Surgeon. The plaintiff sought treatment from PW2 several times from February 2017 till November 2019. He gave evidence that the plaintiff had complaints of neck pain and occipital headaches
G when he saw her. He stated that upon comparing the MRI done in 2015 and 2016 after the PDCT, he merely saw non-specific changes which did not correlate with her clinical picture. He did not find her complaints of pain to be significant and advised her that she could safely continue with her physical activities.

H

Liability of Ampang Puteri Hospital

[87] In view of my finding that D2 is liable in failing to advise the plaintiff as to the risk of pain and needle bending during the PDCT procedure, the
I question to consider is whether Ampang Puteri is to be equally liable. The plaintiff alleged that D1 is liable for the acts of D2 on two grounds. Firstly, D1 owes a non-delegable duty of care to the plaintiff and secondly, it is vicariously liable for the acts/omission of D2.

[88] Counsel for D1 submitted that the facts of this case do not support the application of the principle that D1 owed a non-delegable duty of care. I agree with his submission. The Federal Court in *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685 affirmed the application of the non-delegable duty of care principle in Malaysia. It further enunciated on the features which may lead to its application as follows:

> [36] The nature of a non-delegable duty is, in essence, a positive duty to ensure that reasonable care is taken. Viewed in its proper context thus, non-delegable duties are not an anomaly in the law of negligence without a common basis, but founded on established concepts rooted in the general principles of the law of negligence itself. An assumption of responsibility may be inferred from the creation of a special risk, or a special antecedent relationship between him and the claimant. The assumption of responsibility gives rise to a positive duty to protect the claimant from harm, and forms the rationale for imposing a more onerous duty of care on the defendant. Indeed, the concept of assumption of responsibility has been posited as the unifying basis that may serve to explain both Lord Sumption's first and second categories of cases (see J Murphy, *Juridical foundations of common law non-delegable duties* in JW Neyers et al, *Emerging Issues in Tort Law* (Oxford: Hart, 2007)).

[89] In the instant case, the plaintiff was initially the patient of Dato' Dr Abdul Wahab. When she presented herself at Ampang Puteri Hospital on 20 September 2016, she was seen by D2 who was then covering for Dato' Dr Wahab. PDCT was proposed then. She chose to see D2 for her follow up appointment and indicated her agreement to follow through the PDCT. The facts hardly call for a non-delegable duty of care to be imposed on D1. The fact that the hospital was the center in which the PDCT was performed cannot be construed as an assumption of a positive duty to protect the plaintiff from injury.

[90] The court is also to decide whether it would be fair, just and reasonable to impute such a duty (see: *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal*). I do not consider it to be so when D2 was practising in Ampang Puteri Hospital as an independent contractor at the material time.

[91] The terms of the Consultancy Agreement entered into between D1 and D2, particularly cl 11, is clear in its terms. D2 was to be responsible to procure his own indemnity and other contributions as a self-employed person. Clause 7 further provide that D2 was to be responsible for all claims brought in respect of his negligence. Contrary to the contention of the plaintiff, these clauses indicate that D2 was an independent contractor at the material time. The responsibilities of both D1 and D2 are thus separate and distinct.

[92] D2 himself admitted as much in his evidence. He confirmed in cross-examination that in clinical matters, he bore sole responsibility. This would include the duty of advisement prior to the PDCT procedure and undertaking the procedure itself.

[93] In the circumstances, there is no reason to find D1 liable for the failure of D2 to advise on the material risks in undertaking the PDCT procedure.

Damages

[94] Having found D1 liable to some extent, I now come to the issue of damages to be awarded. The plaintiff's counsel has prepared a table in Appendix 1 setting out the details of her claim and the position taken by D1 and D2. This has been of great assistance. I shall deal only with the major items and those that are seriously contested.

Special damages

[95] The plaintiff seeks a lump sum figure for hospital and medical expenses of RM50,000. The medical expenses for the PDCT came to RM20,955.60, a figure agreed to by the second defendant in the event liability is established. The medical bill for the PDCT procedure on 4 November 2016 shows the sum of RM20,955.60 was charged. I therefore award the said sum for medical expenses. I also allow RM1,000 for travelling expenses for the plaintiff and her family to visit her post PDCT procedure.

[96] The plaintiff claims an amount of RM22,000 for loss of income which is alleged to have resulted from the procedure. The plaintiff was employed with the government at the material time. I do not find any documentary evidence to substantiate this claim. If she was on unpaid leave after the PDCT as she claimed, there would have been an approval letter allowing her to go on such leave. I am also not convinced on the evidence that she was so disabled as to be unable to work after the PDCT.

[97] She has also claimed for the cost of medications, nutritional supplements, physiotherapy, massage services, chiropractic treatment, maid cleaning services and the value of care provided by her family services. I am not convinced on the evidence that all these costs arose as a consequence of the pain experienced from the PDCT procedure. It bears repeating the trite principle that special damages must be strictly proved. The plaintiff had chronic spondylosis even prior to seeing D2 which would have caused her to incur these expenses in any event.

General damages

[98] The plaintiff claims an amount of RM150,000 as general damages for pain and suffering. D2 on the other hand, views that RM18,000 is a reasonable amount for the pain she experienced. I am guided by the well-established principle that damages for personal injuries are not punitive and still less a reward. They are intended to monetarily compensate the injured party reparation for the wrongful act and for all the natural and direct consequences of the act (see: *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324).

[99] To substantiate her claim on pain, the plaintiff adduced evidence that a month after the procedure, the plaintiff presented herself at the Ampang Puteri Hospital on 22 December 2016 with complaints of cervical pain. She was admitted and discharged on 27 December 2016. However she asked to leave on Christmas Eve and only returned to the hospital the following day. This fact would somewhat diminish her evidence on the severity of her pain. Further, the medical evidence before this court suggests that pain is a known complaint of patients with cervical spondylosis.

[100] There are no decided cases on point in respect of the same injury. However, having considered the amounts that the courts have awarded for more serious cases, I consider RM25,000 a reasonable amount to compensate the plaintiff for the pain she experienced immediately after the PDCT.

[101] As for the costs of treatments the plaintiff alleged is necessary, I find no basis upon which to award general damages for these treatments as I do not find it warranted by the PDCT procedure.

Aggravated damages

[102] The plaintiff has made a claim of RM200,000 as aggravated damages. Her counsel submitted that an award was justified as she was submitted to unnecessary treatment which caused her pain. She was also not duly advised on the risks of the procedure. She was subjected to unfair cross-examination at the trial when it was put to her that she was not in pain. The refusal of the defendants to provide medical records caused the plaintiff to be put to unnecessary expense to obtain an order for pre-action discovery. Finally, D2's defence contained unpleasant statements which were threatening, obstructing and constituted harassment of the plaintiff.

[103] Aggravated damages are awarded where a defendant's tortious act was done in a manner which injured the plaintiff's feelings of pride and dignity, causing humiliation and distress (see: *Rookes v Barnard* [1964] AC 1129). Having found that the PDCT was appropriate treatment, this puts paid to the

allegation that she was subject to unnecessary treatment. As for the other grounds, I do not find them any more vexatious than what a party in a litigation is ordinarily subjected to. The instances relied on by the plaintiff to seek an award of aggravated damages appears to me to be stretching the application of the principle in *Rookes v Barnard* a little too far. I therefore find the claim for aggravated damages to be without merit.

Costs

[104] The plaintiff was awarded costs in respect of a striking out application taken by D2 which the plaintiff partially succeeded in the Court of Appeal. Certain paragraphs of the plaintiff's reply which were struck out were restored on appeal. Costs were ordered to be costs in the cause. I consider an award of costs of RM15,000 to be reasonable for both the High Court and Court of Appeal proceedings.

[105] As for the costs of the present proceedings, plaintiff prays for a Sanderson order to be made, wherein D2, being the unsuccessful defendant is to pay the costs of D1, the successful litigant. This would be an exception to the general rule that costs is to follow the event (see: O 59 r 3(2) of the Rules of Court 2012). The plaintiff submits that whether such an order should be made would depend on whether the plaintiff acted reasonably in suing D1.

[106] A Sanderson order can be made if the court considers on the facts, it was reasonable for the plaintiff to have sued the defendants and that it was reasonable to be in a state of uncertainty as to which of the defendants is the one really liable (see: *Besterman v British Motor Cab Company, Limited* [1914] 3 KB 181).

[107] In *Chua Teck Chew Robert v Goh Eng Wah* [2009] SGCA 40; [2009] 4 SLR 716, the Singapore Court of Appeal held,

> The purpose of a Sanderson order (and likewise a Bullock order) is to avoid the injustice of a successful claimant having what he recovers in damages eroded by an order to pay costs to successful defendants whom it was reasonable for him, when he does not know which of the defendants to sue, to join (see *Irvine v Commissioner of Police for The Metropolis* [2005] CP Rep 19 at [22]). In deciding whether to grant a Sanderson order, the court's principal consideration is whether it would be fair and reasonable for the unsuccessful defendant to bear the costs of the successful defendant(s).

[108] I do not think the facts in this case fall within the circumstances for a Sanderson order to be made by this court. The plaintiff cannot be said to be uncertain as to the party to sue for her injuries. Her statement of claim against both defendants pleaded specific and distinct particulars of negligence against

both. She was aware of the terms of the consultancy agreement between both D1 and D2, which provide for D2 to take responsibility for any negligence suit filed. I therefore decline to make a Sanderson order. The costs to be paid to D1 is to be borne by the plaintiff. I view that an amount of RM30,000 as costs to be reasonable for undertaking the defence of D1, and I order the plaintiff to pay this amount.

CONCLUSION

[109] Premised on my findings in the foregoing paragraphs, I hereby order as follows:

(a) the plaintiff's claim against D1 is dismissed with costs of RM30,000;

(b) the plaintiff's claim against D2 is allowed for special damages of RM21,955.60 and general damages of RM25,000 only;

(c) costs of RM70,000 is ordered against D2. An additional RM15,000 is awarded as costs for the interlocutory application;

(d) interest at 4% is allowed on special damages of RM21,955.60 from 2 November 2016 to the date of judgment;

(e) interest at 8% is allowed on the sum of RM25,000 from the date of 22 November 2019 (date of service of the writ) to the date of judgment; and

(f) interest on the sum adjudged at 5% from the date of judgment until the date of realisation.

Order accordingly.

Reported by Dzulqarnain Ab Fatar